

## **2009 DRAFTING REQUEST**

### **Bill**

Received: **11/10/2008**

Received By: **pkahler**

Wanted: **As time permits**

Identical to LRB:

For: **Jon Erpenbach (608) 266-6670**

By/Representing: **Julie Laundrie**

This file may be shown to any legislator: **NO**

Drafter: **pkahler**

May Contact:

Addl. Drafters: **phurley**

Subject: **Real Estate - miscellaneous  
Courts - civil procedure  
Courts - torts**

Extra Copies:

Submit via email: **YES**

Requester's email: **Sen.Erpenbach@legis.wisconsin.gov**

Carbon copy (CC:) to:

---

### **Pre Topic:**

No specific pre topic given

---

### **Topic:**

Economic loss doctrine in residential real estate transactions

---

### **Instructions:**

See attached

---

### **Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	pkahler 11/11/2008	bkraft 11/13/2008		_____			
/P1			jfrantze 11/13/2008	_____	lparisi 11/13/2008		
/1	pkahler 11/20/2008	bkraft 11/20/2008	mduchek 11/21/2008	_____	mbarman 11/21/2008	cduerst 11/21/2008	

FE Sent For:

<END>

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/P1			jfrantze 11/13/2008	_____	lparisi 11/13/2008		
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/P1		1/bjk 11/20	jfrantze 11/13/2008		lparisi 11/13/2008		

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No specific pre topic given

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**Topic:**

Economic loss doctrine in residential real estate transactions


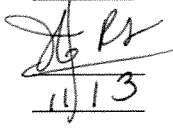
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**Instructions:**

See attached

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**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	pkahler	1/1 bjk 11/13	 11/13	 11/13			

FE Sent For:

&lt;END&gt;

## Kahler, Pam

**From:** Hurley, Peggy  
**Sent:** Monday, November 10, 2008 11:27 AM  
**To:** Hanaman, Cathlene; Kahler, Pam  
**Subject:** RE: Your request

My initial thoughts:

1. The analysis and the bill itself each contain a statement that the tort action is "in addition to other remedies available by law." I'm not sure, then, why he thinks that it is not clear that the bill doesn't prevent any current legal remedy that exists.
2. The bill doesn't use "buyer" and "seller" - the analysis uses "homebuyer" and the bill itself just uses "person." I'm not sure where we should be substituting "purchaser" for "buyer" (also, the analysis uses "purchaser" when it explains the economic loss doctrine). So . . . I'm confused on this one, too.
- ✓ 3. I think Julie had it right - "person" is used all over to describe people and business entities. Maybe point out s. 990.01(26)?
4. I am not sure what this means - I can't find a definition of "residential real estate transaction" in any other section or statute.

Your thoughts?

**From:** Hanaman, Cathlene  
**Sent:** Monday, November 10, 2008 11:15 AM  
**To:** Hurley, Peggy; Kahler, Pam  
**Subject:** FW: Your request

Pam and Peggy--The "as well" in her sentence refers to a draft of mine--don't think you missed some redraft instructions.

-C

**From:** Laundrie, Julie  
**Sent:** Monday, November 10, 2008 11:12 AM  
**To:** Hanaman, Cathlene  
**Cc:** Laundrie, Julie  
**Subject:** RE: Your request

I have changes to this preliminary draft as well - see below. Let me know if you have any reaction to these suggestions either positive or negative. Thank you again,

Julie

<< File: 07-4481P1.pdf >>

- 1 add a statement that this bill does not prevent any current legal remedy that exists for any party
- 2 changing the buyer and seller to purchaser and seller (cannot remember why but I thought it was a good enough reason to write it down). *→ in analysis ???*
- 3 Add that the bill would include those that have an "interest" in the home - his argument on this was that if a bank owned a home because of foreclosure and they sell that they are the ones covered - not the previous owner. His other example was if a business own part of a residential property and they sell there could be confusion with the word "person" in the draft - I told him we use person everywhere to include people and businesses - he suggested clarification or a reference to a definition of person.
- 4 Add a reference to a definition residential real estate transaction from another section in the statute

Julie Laundrie

*the bill is even less limited - do you want to limit to person who currently holds legal title (or who has been committed?)*  
*in addition to any other remedies available...*  
*→ provide a definition what word is unclear?*  
*reState → a transaction involving residential real estate*

Office of Senator Jon Erpenbach  
608-266-6670 cell 608-772-0110

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**From:** Hanaman, Cathlene  
**Sent:** Friday, August 08, 2008 11:45 AM  
**To:** Laundrie, Julie  
**Subject:** Your request

Thank you for your request, Julie. We will get it to you as soon as possible. If we have any questions, we'll be sure to let you know.

-Cathlene Hanaman  
LRB



**Kahler, Pam**

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**From:** Hanaman, Cathlene  
**Sent:** Monday, November 10, 2008 1:24 PM  
**To:** Kahler, Pam; Hurley, Peggy  
**Subject:** FW: question

More....

---

**From:** Laundrie, Julie  
**Sent:** Monday, November 10, 2008 1:21 PM  
**To:** Hanaman, Cathlene  
**Subject:** FW: question

An addition to the earlier email - really the only relevant comment is the fourth point. I am guessing I need to have a discussion with you about this - I was not aware there were more than one definition.....

Julie

Julie Laundrie  
Office of Senator Jon Erpenbach  
608-266-6670 cell 608-772-0110

---

**From:** Theo, Mike - VP Public Affairs/Legal [mailto:mtheo@wra.org]  
**Sent:** Monday, November 10, 2008 11:33 AM  
**To:** Laundrie, Julie  
**Subject:** RE: question

Hi Julie:

Thanks for the reminder. Here are our thoughts:

1. No objection.
2. No objection.
3. No real objection, but a question or two. We read the intent here to make certain we capture the person (including a business entity) making the sale to the purchaser if that person is making an intentional misrepresentation. Correct? We just need to make certain that we're not sweeping in additional parties that would not have been potential litigants prior to Below v. Norton.
4. This has been one of our questions - we just need to make certain we all agree on which definition is being used. I think we would prefer the definition in Chapter 709.

Let me know if you want this in more detail or if you want to discuss with our team.

Thanks Julie!

Mike

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11/10/2008

**From:** Laundrie, Julie [mailto:Julie.Laundrie@legis.wisconsin.gov]  
**Sent:** Monday, November 10, 2008 10:51 AM  
**To:** Laundrie, Julie; Theo, Mike - VP Public Affairs/Legal  
**Subject:** RE: question

Hey Mike,

Just in case you could not find. I am going to go ahead and request these changes later today. Let me know if any are a problem asap and I will request the change.

Julie

Julie Laundrie

Office of Senator Jon Erpenbach

608-266-6670 cell 608-772-0110

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**From:** Laundrie, Julie  
**Sent:** Thursday, September 25, 2008 8:29 AM  
**To:** 'mtheo@wra.org'  
**Subject:** question

Hey Mike,

So I talked with Charles Schmidt from Canon Dunphy two days ago about Sen. Erpenbach's draft. I gave him the same speech I have given everyone, which he was less than happy to hear because he would like broad tort reform in real estate and other transactions☺ but he did bring up a few suggestions I thought might clarify the bill better.

- 1- add a statement that this bill does not prevent any current legal remedy that exists for any party
- 2- changing the buyer and seller to purchaser and seller (cannot remember why but I thought it was a good enough reason to write it down).
- 3- Add that the bill would include those that have an "interest" in the home – his argument on this was that if a bank owned a home because of foreclosure and they sell that they are the ones covered – not the previous owner. His other example was if a business own part of a residential property and they sell there could be confusion with the word "person" in the draft – I told him we use person everywhere to include people and businesses – he suggested clarification or a reference to a definition of person.
- 4- Add a reference to a definition residential real estate transaction from another section in the statute

Because I am not a lawyer and have never actually played one on TV, I have no clue what these changes would do. Why don't you give me your initial reaction and we can move ahead one of two ways. If you concerned at all, we can have a meeting with the drafters from LRB – Leg Council and you and an attorney of your choice about the potential changes. If you think it will be ok, but want to see the finished product before you say either way, I can do a /2 and give it to you when done.

Let me know,

Julie

11/10/2008

Julie Laundrie

Office of Senator Jon Erpenbach

608-266-6670 cell 608-772-0110

11-10

Julie Landrie

do limit to purchaser / seller

show us know about a definition

- n.
1. ok as is
  2. ok as is, except for limitation above
  3. See above
  4. def → later

## Kahler, Pam

---

**From:** Laundrie, Julie  
**Sent:** Tuesday, November 11, 2008 8:19 AM  
**To:** Kahler, Pam  
**Cc:** Hurley, Peggy  
**Subject:** RE: Below v. Norton

AHHHH, that is why you guys do the drafting and we do the selling☺

I think that is a great idea. Lets go ahead with it and see what the group says – when do drafts stop being P-drafts and start being drafts?

Thank you again, sorry about the mixup yesterday – I am trying to get all of my stuff together this week.

Julie

Julie Laundrie  
Office of Senator Jon Erpenbach  
608-266-6670 cell 608-772-0110

---

**From:** Kahler, Pam  
**Sent:** Monday, November 10, 2008 2:46 PM  
**To:** Laundrie, Julie  
**Cc:** Hurley, Peggy  
**Subject:** Below v. Norton

Hi, Julie:

An idea about the definition of "residential real estate transaction":

Peggy had an idea about limiting the types of transactions by limiting the person who, in the bill, has committed the fraud to a seller *who is required to complete a real estate condition report*. That way, only transactions that come under ch. 709 would be involved - without having to define the type of transaction. In that chapter, the types of transactions are transfers by sale, exchange, or land contract. I hesitate to use the word "inhabited" in a definition, since I don't think it's limited to "residing in," but if ch. 709 is understood to mean only certain types of residential real estate, going at it from the perspective of who the seller is might work.

Pam

*Pamela J. Kahler*  
*Legislative Attorney*  
*Legislative Reference Bureau*  
608-266-2682

# RESEARCH APPENDIX - Draft Transfer/Copy Request Form

- Atty's please complete this form and give to Mike Barman

(Request Made By: PJK) (Date: 11 / 10 / 08)



Please transfer the drafting file for

2007 LRB 4481 to the drafting file

for 2009 LRB 0689

The final version of the 2007 draft and the final Request Sheet will copied on yellow paper, and returned to the original 2007 drafting file. A new cover sheet will be created/included listing the new location of the drafting file's "guts".

For research purposes, because the 2007 draft was incorporated into a new 2009 draft, the complete drafting file will be transferred, as a separate appendix, to the new 2009 drafting file. This request form will be inserted into the "guts" of the 2009 draft. If introduced, the appendix will be scanned/added to the electronic drafting file folder.

**--OR--**



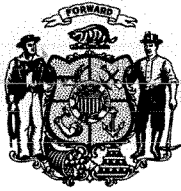
Please copy the drafting file for

2009 LRB /                      (include the version) and place it in the

drafting file for 2009 LRB

For research purposes, because the original 2009 draft was incorporated into another 2009 draft, the original drafting file will be copied on yellow paper (darkened/auto centered/reduced to 90%) and added, as a separate appendix, to the new 2009 drafting file. This request form will be inserted into the "guts" of the new 2009 draft. If introduced the appendix will be scanned/added to the electronic drafting file folder.

The original drafting file will then returned, intact, to its folder and filed. For future reference, a copy of the transfer/copy request form will also be added to the "guts" of the original draft.



State of Wisconsin  
2007 - 2008 LEGISLATURE

0689  
LRB-4481/P1  
PJK&PJH:bjk:pg  
stays  
PI

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION ✓

Inserts

D-note  
(in 11-11)  
SA ✓  
X-ref ✓

Regenerate ↓

- 1 AN ACT *to create* 895.10 of the statutes; **relating to:** a tort action for intentional  
2 misrepresentation in a residential real estate transaction. ✓

***Analysis by the Legislative Reference Bureau***

In *Below v. Norton*, 2008 WI 77, 751 N.W. 2d 351, the Wisconsin Supreme Court determined that the economic loss doctrine bars a homebuyer from recovering in tort for an intentional misrepresentation concerning the property made by the seller of the property. Under the judicially created economic loss doctrine, a purchaser of a product that is defective may not recover from the seller on a tort theory, such as an action for damages for fraud or intentional misrepresentation, for damages that are solely economic; the recovery is limited to damages for a breach of contract. Before *Below*, with respect to real estate sales, the economic loss doctrine applied only to commercial transactions. ✓

This bill reverses the decision in *Below* by providing that, in addition to any other remedies that are available, a person may maintain an action in tort against another person for fraud committed, or an intentional misrepresentation made, by that other person in a residential real estate transaction. ✓

***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

- 3 SECTION 1. 895.10 of the statutes is created to read:

the transferor in the

## SECTION 1

Insert 2-1

1 ✓ **895.10 Tort actions in residential real estate transactions.** In addition  
2 to any other remedies available under law, a ~~person~~ <sup>transferor</sup> may maintain an action in tort  
3 against another person for fraud committed, or an intentional misrepresentation  
4 made, by that other person in a residential real estate transaction. ✓

## SECTION 2. Initial applicability. → the transferor in the

6 (1) This act first applies to residential real estate transactions that are  
7 completed on the effective date of this subsection.

8 (END) ✓

the  
real estate  
transferor  
transferor

transferee  
transferee in a residential real  
transaction  
estate transaction

D-note



**2009-2010 DRAFTING INSERT**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-0689/?ins  
PJK&PJH:.....

Lbjk

**INSERT A-1**

not H ✓  
transferee (purchaser) in a residential real estate transaction ✓  
(END OF INSERT A-1)

**INSERT A-2**

not H ✓  
the transferor (seller) of the real estate ✓  
(END OF INSERT A-2)

**INSERT A-3**

not H ✓  
The bill defines a residential real estate transaction as a real estate transfer for which a real estate condition report is required, which is, generally, a transfer of previously inhabited real property.  
(END OF INSERT A-3)

**INSERT 2-1**

- not H ✓  
1 (1) In this section, "residential real estate transaction" means a real estate  
2 transfer to which s. 709.01 (1) applies. ✓  
3 H (2)

(END OF INSERT 2-1)

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-0689/7dn  
PJK&PJH:.....

PI  
Lbjk

Date

> Rather than use "purchaser" and "seller," I used "transferee" and "transferor," because s. 709.01 (1) uses the phrase "transfer by sale, exchange, or land contract." If you want to further limit the parties to only purchasers and sellers, we would have to modify the definition of "residential real estate transaction" so that it applies only to a transfer by sale.✓

Pamela J. Kahler  
Senior Legislative Attorney  
Phone: (608) 266-2682  
E-mail: [pam.kahler@legis.wisconsin.gov](mailto:pam.kahler@legis.wisconsin.gov)

**DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-0689/P1dn  
PJK:bjk:jf

November 13, 2008

Rather than use "purchaser" and "seller," I used "transferee" and "transferor," because s. 709.01 (1) uses "transfer... by sale, exchange or land contract." If you want to further limit the parties to only purchasers and sellers, we would have to modify the definition of "residential real estate transaction" so that it applies only to a transfer by sale.

Pamela J. Kahler  
Senior Legislative Attorney  
Phone: (608) 266-2682  
E-mail: [pam.kahler@legis.wisconsin.gov](mailto:pam.kahler@legis.wisconsin.gov)

**Kahler, Pam**

---

**From:** Laundrie, Julie  
**Sent:** Thursday, November 20, 2008 11:48 AM  
**To:** Kahler, Pam  
**Subject:** RE: question

It is ready!!!! As far as I know that is it and we are all systems go!!!! Thank you.

Julie Laundrie  
Office of Senator Jon Erpenbach  
608-266-6670 cell 608-772-0110

---

**From:** Kahler, Pam  
**Sent:** Thursday, November 20, 2008 11:45 AM  
**To:** Laundrie, Julie  
**Subject:** RE: question

I think no changes are necessary, but we will have to run it as a /1 so that it can be introduced. Please verify the "no changes" before I run it as a /1. I wouldn't want to go ahead if there is something else someone wants. Thanks!

---

**From:** Laundrie, Julie  
**Sent:** Thursday, November 20, 2008 11:42 AM  
**To:** Kahler, Pam  
**Subject:** RE: question

They don't want the change after seeing your comments☺ so I can't remember where we are. Do I have the current draft or do we need changes???

Julie

Julie Laundrie  
Office of Senator Jon Erpenbach  
608-266-6670 cell 608-772-0110

---

**From:** Kahler, Pam  
**Sent:** Thursday, November 20, 2008 10:51 AM  
**To:** Laundrie, Julie  
**Subject:** RE: question

I don't think that options should be included in s. 709.01 (1). That provision identifies the types of transfers that require completion of a real estate condition report, and an option is not a transfer in and of itself. If the option is exercised, then there is a transfer by sale, which is already referred to in s. 709.01 (1). Notice that s. 709.02 (1) refers to contracts of sale and option contracts in the context of when the condition report must be furnished, i.e., within 10 days after acceptance of either one. Either one is preliminary to a completed transfer (sale). In fact, an option is even one more step removed from a completed transfer, since first the seller must accept it, and then the prospective buyer must exercise it after the seller has accepted it. An option gives the prospective buyer an interest in the property but does not transfer the property to that person. Because s. 709.01 (1) just specifies the applicable types of completed transfers, I don't think that an option should be mentioned there.

---

**From:** Laundrie, Julie  
**Sent:** Thursday, November 20, 2008 10:16 AM  
**To:** Kahler, Pam; Hurley, Peggy  
**Subject:** FW: question

See below and let me know what you think.

Julie

Julie Laundrie  
Office of Senator Jon Erpenbach  
608-266-6670 cell 608-772-0110

---

**From:** Theo, Mike - VP Public Affairs/Legal [mailto:mttheo@wra.org]  
**Sent:** Thursday, November 20, 2008 10:05 AM  
**To:** Laundrie, Julie  
**Subject:** RE: question

Julie, we've discussed Pam's e-mail and agree with her point that adding the definitions will certainly be redundant and hopefully not needed. Thus we would agree they are not necessary to be added to the draft bill. The one question that remains has to do with "options," which referenced in 709.05 but not in 709.01. Our thinking is that the reference to options later in Chapter 709 is used to measure when the rescission right is available. When one exercises an option, a sale takes place. It is still a transfer by sale once the option is exercised – i.e.: the option creates the sale. I guess our question is should options be referenced in 709.01 too?

Mike

---

**From:** Laundrie, Julie [mailto:Julie.Laundrie@legis.wisconsin.gov]  
**Sent:** Tuesday, November 18, 2008 12:00 PM  
**To:** Theo, Mike - VP Public Affairs/Legal  
**Subject:** FW: question

Ok Mike – Here is the reaction – you (collectively) and the drafters disagree. You know I am always suspect when something like this comes up. Why don't you call me and we can work out over the phone.  
Julie

Julie Laundrie  
Office of Senator Jon Erpenbach  
608-266-6670 cell 608-772-0110

---

**From:** Kahler, Pam  
**Sent:** Tuesday, November 18, 2008 10:12 AM  
**To:** Laundrie, Julie  
**Cc:** Hurley, Peggy  
**Subject:** RE: question

Julie:

Peggy and I have no strong objection to adding these definitions; they are not wrong. We think they are redundant and unnecessary, however. "Residential real estate transaction" is defined in the new section to mean

11/20/2008

"a real estate *transfer* to which s. 709.01 (1) applies," and the text of the statute says "a *transferee* in a residential real estate transaction...", etc. When you put the definition together with the text, a transferee and a transferor in a residential real estate transaction cannot be anything but the one who receives the transfer and the one who makes the transfer. The words are self-explanatory, which is why they are not necessary. I guess they might be helpful if the reader is unwilling to look at s. 709.01 (1), because that is where the "transfer by *sale, exchange or land contract*" is specified. On the other hand, if you don't look at s. 709.01 (1), you won't understand the definition of "real estate transaction" in the new section. Anyway, as I said, we are not unwilling to include the definitions, if you want us to, but to be consistent with s. 709.101 (1) we would not include "option" in the definition of "transferor" because that is not used in s. 709.01 (1).

Let me know what you'd like us to do. Thanks.

Pam



State of Wisconsin  
2009 - 2010 LEGISLATURE

LRB-0689/21

PJK&PJH:bjk:ff

Staye  
h m g run

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

- (in 11-20)  
(soon)  
- no longer -  
- regen.
- 1 AN ACT *to create* 895.10 of the statutes; **relating to:** a tort action for intentional
- 2 misrepresentation in a residential real estate transaction.

---

***Analysis by the Legislative Reference Bureau***

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This bill reverses the decision in *Below* by providing that, in addition to any other remedies that are available, a transferee (purchaser) in a residential real estate transaction may maintain an action in tort against the transferor (seller) of the real estate for fraud committed, or an intentional misrepresentation made, by the transferor in the residential real estate transaction. The bill defines a residential real estate transaction as a real estate transfer for which a real estate condition report is required, which is, generally, a transfer of previously inhabited real property.

---

***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

✓

**(END)**



## Duerst, Christina

---

**From:** Laundrie, Julie  
**Sent:** Friday, November 21, 2008 1:44 PM  
**To:** LRB.Legal  
**Subject:** Draft Review: LRB 09-0689/1 Topic: Economic loss doctrine in residential real estate transactions

Please Jacket LRB 09-0689/1 for the SENATE.